

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs October 27, 2009

**JOEY E. HERRELL v. HOWARD CARLTON, WARDEN**

**Appeal from the Circuit Court for Johnson County**  
**No. 5157     Robert E. Cupp, Judge**

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**No. E2009-01162-CCA-R3-HC - Filed June 30, 2010**

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JOSEPH M. TIPTON, P.J., concurring.

I concur in the result reached in the majority opinion, given existing precedent. I believe though, that once the habeas court concludes that a judgment is void, it should transfer the case to the convicting court—a court of equal jurisdiction—for further proceedings. The habeas court should not be allowed to act further regarding the convicting case by limiting the options available to the Petitioner or to the convicting court upon transfer of the case.

The procedure followed in the present case, by developing a record in the habeas court to determine whether or not a guilty plea may be withdrawn, stems from the interpretation this court made in Summers v. Fortner, 267 S.W.3d 1 (Tenn. Crim. App. 2008), regarding two Tennessee Supreme Court opinions. See Summers v. State, 212 S.W.3d 251 (Tenn. 2007); Smith v. Lewis, 202 S.W.3d 124 (Tenn. 2006). However, I see nothing in the supreme court cases that even hints at allowing the habeas court to bind a convicting court by determining whether a Petitioner is entitled to withdraw a guilty plea. Upon determining that a conviction or sentence is void, the habeas court should vacate the judgment of conviction and remand the case to the convicting court for further proceedings. Whether or not the Petitioner is entitled to withdraw his guilty plea should be left to the convicting court to decide.

Because Summers v. Fortner is binding precedent, I must concur wholly in this case. See Tenn. Sup. Ct. R. 4(G)(2). I believe, however, that its holdings should be reviewed by

the Tennessee Supreme Court in this case and that the convicting court should be determined to be the forum for deciding whether or not a guilty plea may be withdrawn.

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JOSEPH M. TIPTON, PRESIDING JUDGE